

STATE OF MICHIGAN
COURT OF APPEALS

WABASH VALLEY POWER ASSOCIATION,

Petitioner-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondent-Appellant,

and

MIDWEST ENERGY COOPERATIVE,

Intervenor-Appellee.

UNPUBLISHED

December 15, 2005

No. 260773

Ingham Circuit Court

LC No. 04-001669-AA

Before: Owens, P.J., and Saad and Fort Hood

PER CURIAM.

Respondent Michigan Public Service Commission (PSC) appeals by leave granted the circuit court's order granting Wabash Valley Power Association's ("Wabash") motion to stay proceedings in Wabash's Power Supply Cost Recovery (PSCR) reconciliation case before the PSC. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On March 31, 2004, Wabash initiated its reconciliation application with the PSC. Prior to July 1, 2004, the PSC had jurisdiction to determine rates Wabash charged in Michigan. However, on June 30, 2004, Wabash paid off its loans to the Rural Utilities Service, and as a result, came under the jurisdiction of the Federal Energy Regulatory Commission (FERC). *Arkansas Electric Cooperative Corp v Arkansas Public Service Comm*, 461 US 375, 382; 103 S Ct 1905; 76 L Ed 2d 1 (1983). When Wabash came under the FERC's jurisdiction, Wabash's 2003 PSCR reconciliation case was pending before the PSC. Wabash sought to withdraw its application before the PSC because in proceedings before FERC, FERC issued an order dealing with the very 2003 costs under consideration in the pending PSC matter. Notwithstanding the FERC order, the PSC found that it retained jurisdiction over the case because it pertained to rates that were charged prior to FERC's assumption of jurisdiction. The circuit court granted Wabash's motion to stay the PSCR reconciliation proceedings. We granted PSC's application for leave to appeal.

The PSC argues that only the Michigan Court of Appeals, not the circuit court, has jurisdiction to enjoin PSC proceedings. However, in *Attorney General v Public Service Comm*, 237 Mich App 27, 41; 602 NW2d 207 (1999), we found that the circuit court review does have jurisdiction to an interlocutory order of the PSC is under MCL 24.301 if review of the agency's final decision would not provide an adequate remedy. We noted that orders concerning PSCR proceedings did not fix any rate, regulation, practice, or service, and were not appealable to this Court under MCL 462.26. *Id.* at 38-39.

PSC also maintains that the circuit court erred in granting Wabash's motion because Wabash failed to meet the requirements for entitlement to injunctive relief. We review a decision granting injunctive relief for abuse of discretion. *Comm'r of Ins v Arcilio*, 221 Mich App 54, 77; 561 NW2d 412 (1997). In determining whether to issue an injunction, the court must consider four factors: (1) harm to the public if an injunction issues, (2) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if relief is granted, (3) the likelihood that the applicant will prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if relief is not granted. *Id.* at 77-78.

Acts of Congress on interstate commerce are supreme and exclusive. Consequently, a state agency's efforts to regulate commerce must fail when they conflict with or interfere with federal authority over the same activity. *Mississippi Power & Light Co v Mississippi*, 487 US 354, 377; 108 S Ct 2428; 101 L Ed 2d 322 (1988). The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. *Id.* at 375.

Under 16 USC 824e, FERC is responsible for assuring that the rates charged to purchasers of electric energy at wholesale, and the contracts affecting such rates, are not unjust, unreasonable, unduly discriminatory, or preferential. FERC has exclusive authority to determine the reasonableness of wholesale rates. *Nantahala Power & Light Co v Thornburg*, 476 US 953, 963-964; 106 S Ct 2349; 90 L Ed 2d 943 (1986). States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale costs. *Id.* at 970. A state may not enter an order trapping costs a utility is mandated to pay under a FERC order, or to undertake a prudence review to determine whether to issue such an order. *Mississippi Power & Light Co, supra* at 372.

In its reconciliation case, Wabash sought an additional recovery for 2003 power costs. It also requested recovery of these costs in the rate tariff presented to FERC. Intervenor Midwest Energy Cooperative challenged the recovery of these costs in FERC proceedings. In response, on June 29, 2004, in its order, FERC expressly determined that it would exercise exclusive jurisdiction over all rates, terms and conditions of wholesale electric service and transmission in interstate commerce provided by Wabash, including any existing contracts and addressed the 2003 cost recovery issue. No appeal was taken from this FERC decision.

In considering federal acts, courts will defer to an agency's construction of the statute if it does not violate the plain meaning thereof and is reasonable. This rule of deference applies to an agency's interpretation of its own statutory authority or jurisdiction. *Commodity Futures Trading Comm v Schor*, 478 US 833, 844-845; 106 S Ct 3245; 92 L Ed 2d 675 (1986). Where FERC's exercise of its exclusive jurisdiction was not challenged, and specifically addressed the

issue pending on the PSC proceeding, PSC did not have the authority to conduct the PSCR reconciliation, and the circuit court did not abuse its discretion in granting injunctive relief.

Affirmed.

/s/ Donald S. Owens

/s/ Henry William Saad

/s/ Karen M. Fort Hood